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No. 79-236

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In the  
**Supreme Court of the United States**  
October Term, 1979

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PLACID OIL COMPANY,

*Petitioner,*

*v.*

DEPARTMENT OF ENERGY, ET AL.,

*Respondents.*

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**SUPPLEMENTAL PETITION FOR WRIT OF  
CERTIORARI TO THE TEMPORARY EMERGENCY  
COURT OF APPEALS OF THE UNITED STATES**

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Placid Oil Company hereby supplements its Petition for Writ of Certiorari filed herein on August 13, 1979.

**REASON FOR SUPPLEMENT**

This Supplemental Petition is filed to call the Court's attention to certain congressional actions which have taken place since the original Petition was filed. Sup. Ct. R. 24-5

## CONGRESSIONAL ACTION

On September 7, 1979, the Senate of the United States adopted by voice vote, Amendment No. 535 to S. 1477, as follows:

That the portion of Public Law 89-554 (80 Stat. 393), now codified as Section 706 of Title 5, United States Code, is amended by striking out the first sentence thereof and substituting therefor the following:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. *There shall be no presumption that any rule or regulation of any agency is valid*, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, *the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown*. Provided, however, that if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution action for civil penalty shall have sustained the burden of proof normally applicable in such actions.

(Emphasis added)

The bill, containing the above-quoted amendment, has been sent to the House of Representatives.

Prior to passage of this amendment by the Senate, it had been the subject of lengthy debate in the House of Delegates of the American Bar Association, at that group's Annual

Meeting in Dallas, Texas, in August, 1979. Like the Senate subsequently, the ABA went on record in support of the amendment. 65 ABAJ 1286 (Sept. 1979)

## RELEVANCE OF THE CONGRESSIONAL ACTION

Placid's Petition, pending in this Court, argues that the Temporary Emergency Court of Appeals has imposed upon the regulated industry a burden, when attacking an agency order, rule, or regulation, which is virtually impossible to meet and which denies to the affected company or person effective judicial review. Placid demonstrates, in its Petition, that the order of which it complains, solely because of that burden and the limited review it affords, has been upheld by the courts below notwithstanding those courts' characterizations of the order as inconsistent with prior orders of the agency and the distinctions made by the agency as "not wholly satisfying," "slightly unfair," and "technical." Finally, Placid's Petition demonstrates that the standards of review which TECA has established for review of orders and regulations of The Department of Energy are more stringent even than those applied to other federal agencies.

The Senate's passage of the significant amendment quoted demonstrates that Placid's concern for the restoration of accountability to agency decision making is shared by a substantial portion of the members of Congress. Indeed, one of the sponsors of the amendment, Senator Bumpers of Arkansas, said:

If there is an issue of public policy on which there is a broader consensus in this country, I do not know what it is. A glance at just a small portion of the mail coming into every Senator's office every day is justification enough for this Amendment. 125 Cong. Rec. S12147 (daily ed. Sept. 7, 1979)



Further, as the passage of this amendment makes abundantly clear, this problem of administrative accountability is perceived by others as well as Placid as significantly related to the procedural burdens placed upon parties complaining of governmental action. Even the opponents of the amendment were "not unsympathetic with [its] objective", (125 Cong. Rec. S12148 [daily ed. Sept. 7, 1979] [remarks of Sen. Kennedy]), but suggested that the courts themselves were taking care of the problem. For example, Senator Ribicoff, speaking against the amendment said:

I think this Amendment is unnecessary. While it may have been true at one time that courts gave excessive deference to administrative agency expertise, that certainly has not been true for the last few years. Appellate courts have not been hesitant to closely review and then overturn agency actions using the present standard for review, 125 Cong. Rec. S12151, (daily ed. Sept. 7, 1979)

Further, both Senator Bumpers and Senator Kennedy referred to a letter from Harvard Law School Professor Clark Byse, written in opposition to the amendment, in which he expressed the "impression that the courts have shifted or is [sic] in the process of shifting from the view that regulations are presumptively valid." 125 Cong. Rec. S12146 (daily ed. Sept. 7, 1979). Notwithstanding the views of Senator Ribicoff and Professor Byse, Placid respectfully suggests that, far from exhibiting a shift toward greater agency accountability, TECA, at least, over the eight years of its existence, has consistently required less accountability.

Placid certainly does not here suggest that this Court should preempt Congress and reverse the present legislatively imposed procedures and burdens. What Placid does respectfully suggest, though, is that this Court recognize and re-

verse judicially created standards of review which deny regulated persons meaningful access to the courts. Such a standard, Placid further suggests, is the "any rational basis" standard formulated and applied by TECA.

Placid respectfully submits that this Court should grant Placid's Petition for Writ of Certiorari and advise TECA of what has been recognized already by Congress and the American public — agency accountability is an idea whose time has come.

Respectfully submitted,

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Of Counsel:

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**CERTIFICATE OF SERVICE**

In accordance with the United States Supreme Court Rules 33(1) and 33(2) (a), true copies of the foregoing Supplemental Petition for Writ of Certiorari were mailed first-class air mail, postage prepaid, on this 12th day of October, 1979, to the following counsel for Appellees:

Dina Lassow  
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10th and Pennsylvania Avenue  
Washington, D.C. 20530

Solicitor General  
Department of Justice  
Washington, D.C. 20530

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A. B. Conant, Jr.